ESTTA Tracking number: **ESTTA94996**

Filing date: **08/16/2006**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91167237
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Date	08/16/2006
Attachments	Opposition to Motion for Summary Judgment - 91167237.pdf (48 pages)(1353141 bytes)

UNITED STATES PATENT AND TRADEMARK OFFICE

TRADEMARK TRIAL AND APPEAL BOARD

VENTURE OUT PROPERTIES LLC, Opposer, v. WYNN RESORTS HOLDINGS, LLC, Applicant.	Opposition No. **91167237** Mark: **CABANA BAR & CASINO (and design)** IC 41 Serial No. 78/475,098

APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT

Applicant Wynn Resorts Holdings, LLC ("Applicant" or "Wynn"), by and through counsel, submits its Opposition to Opposer Venture Out Properties, LLC's ("Opposer" or "Venture Out") Motion for Summary Judgment.

I. INTRODUCTION

In its Motion for Summary Judgment, Venture Out asserts priority of use and a likelihood of confusion between Wynn's CABANA BAR & CASINO Marks and Venture Out's CABANA and THE CABANA AT WAIKIKI Marks. Venture Out's Motion must be denied for the following reasons:

First, Venture Out has misapplied the legal standard for summary judgment in trademark proceedings. Summary judgment is only proper in the absence of any genuine issue of material fact. In the instant matter, we will show that several genuine issues of material fact exist. Further, since all factual assertions must be viewed in the light most favorable to the non-moving party, Venture Out cannot prevail in a request for summary judgment.

Second, Venture Out has mistakenly asserted priority over Wynn's CABANA BAR & CASINO marks. Although Venture Out's THE CABANA AT WAIKIKI Hotel

allegedly opened before Wynn's CABANA BAR & CASINO, the two marks are used for different services, and the services offered by Wynn and Venture Out under the marks do not overlap. Wynn does not offer, and has never offered, hotel services under its CABANA BAR & CASINO marks. Venture Out has not offered casino services under its CABANA marks. Thus the date of first use of the respective CABANA Marks at issue is moot. In fact, Wynn can clearly establish priority of use for its CABANA Marks for casino services, since none of these services are offered (or allegedly offered) by Venture Out under its CABANA Mark.

Finally, the CABANA BAR & CASINO mark in question poses no likelihood of confusion amongst the consuming public. Venture Out claims a likelihood of confusion between the two marks is "indisputable." However, after a careful analysis of each of the Du Pont factors referenced by Venture Out, it is clear that no likelihood of confusion exists and that Wynn is legitimately using its CABANA BAR & CASINO Marks in commerce for the services listed in its Application.

For these and other reasons discussed in more detail *infra*, Wynn respectfully requests that Venture Out's Motion for Summary Judgment be **denied.**

II. STATEMENT OF FACTS

On or about August 27, 2004, Applicant filed with the U.S. Patent and Trademark Office an intent-to-use application to register "CABANA BAR & CASINO" (and design) for casino services in International Class 41. See Declaration of Kevin Tourek ("Tourek Decl."), **Exhibit 1**, ¶ 4; Application for CABANA BAR & CASINO (Serial No. 78/475,098), **Exhibit 2**. The application did not include a request to register the mark for hotel services.

The Cabana Bar & Casino opened and began providing casino services on April 28, 2005, the day the Wynn Las Vegas resort hotel casino opened for business. See Tourek Decl. ¶ 5. The CABANA BAR & CASINO mark is used only in conjunction with the Wynn Las Vegas resort casino and is only advertised to guests staying at the

casino. See Tourek Dec. ¶ 6. Although Opposer contends that the casino services offered by Applicant are related to the hotel services offered by Opposer, the CABANA BAR & CASINO mark is not used to provide hotel services or to draw patrons to the Wynn Las Vegas resort. See Tourek Decl. ¶ 7.

Rather, the Cabana Bar & Casino is a semi-permanent, open walled, cabana structure with a canopy roof, adjoining a swimming pool at the Wynn Las Vegas resort. See Tourek Decl. ¶ 8. The Cabana Bar & Casino and the swimming pool are located on the Wynn Las Vegas resort property behind the buildings on the famous Las Vegas "Strip" and can only be reached by guests passing through the casino itself. In passing through the Wynn Las Vegas resort to reach the Cabana Bar & Casino and the swimming pool, a number of signs and advertisements put the visitor on notice that the property and its amenities (including the Cabana Bar & Casino) are part of the Wynn Las Vegas resort, not a separate, distinct entity. See Tourek Decl. ¶ 9, 10. Nothing indicates to the consumer that he is leaving the Wynn Las Vegas resort when he arrives at the Cabana Bar & Casino. Moreover, as noted below, the Cabana Bar & Casino are used by guests staying at the Wynn. See Tourek Decl. ¶ 11.

The swimming pool and the Cabana Bar & Casino are open only to adult guests who have registered and are staying at the Wynn Las Vegas resort casino. See Tourek Decl. ¶ 11. The Cabana Bar & Casino offers alcohol and other beverages, pre-prepared food and snacks for sale to pool guests, as well as opportunities to gamble in an outdoor environment. See Tourek Decl. ¶ 12.

Opposer has sought to register "CABANA" in connection with hotel services. See Opposer's Motion for Summary Judgment, section II, Background. However, its application was subject to an office action and has currently been suspended. See id. Opposer has not sought to register "CABANA" in connection with casino services. Opposer contends that the services identified in Applicant's Application for casino services are related to hotel services but provides no evidence or support for its

assertion. See id. Applicant contends that they are not exclusively related to hotel services and represents that it does not use its mark for hotel services.

Besides the differences in the services offered by Applicant and Opposer, the marks themselves have distinguishing features. Applicant's mark contains the words "Bar" and "Casino." Only licensed liquor and gaming businesses can offer bar and casino services. Furthermore, it is not likely that a consumer would infer that hotel services are offered under the mark "CABANA BAR & CASINO." The mark contains no words and no graphics which would suggest that lodging services were offered under the mark. Thus, without evidence to support Opposer's claims, its arguments must fail.

Finally, in this case, the mark in question contains the word "casino." Casinos are not, and never have been, permitted in the State of Hawaii, where the Opposer uses its mark. Las Vegas, on the other hand, is arguably the most famous location for casinos in the world. Consumers viewing Applicant's mark will not associate it with a Hawaiian hotel, where gambling is illegal. Because of this and actual disputes over material facts, summary judgment is improper and Opposer's Motion must be denied.

III. LEGAL ARGUMENT

A. The Summary Judgment Standard

The Trademark Trial and Appeal Board ("TTAB") follows the same standards for summary judgment as the federal courts. See Spraying Systems Co. v. Delavin, Inc., 975 F.2d 387, 392 (7th Cir. 1992). "[T]he party moving for summary judgment, bears the initial burden of demonstrating the absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law." See Hornblower & Weeks, Inc. v. Hornblower & Weeks, Inc., 60 USPQ2d 1733, 1735 (TTAB 2001). "If opposer meets this burden, then applicant, to avoid entry of an adverse judgment, must present sufficient evidence to show an evidentiary conflict as to one or more material facts in issue." See id. Of course, as in any summary judgment evaluation, "the evidence must

be viewed in a light most favorable to . . . the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. See id.

If a party brings a motion for summary judgment in a trademark proceeding based upon prior use and likelihood of confusion it "must establish that there is no genuine dispute as to (1) its priority of use and (2) that contemporaneous use of the [marks] by the parties, for their respective services, would be likely to cause confusion, mistake or to deceive consumers." See id. Under this standard, Venture Out has the burden of establishing that there is no genuine issue of material fact as to (1) its priority of use of the CABANA Marks for similar services; (2) the similarity or dissimilarity of the CABANA Marks in question; and (3) Wynn and Venture Out's contemporaneous use of marks containing the term "CABANA" is likely to cause confusion. See id. Venture Out cannot establish any of these factors. Thus, summary judgment is not appropriate and Venture Out's Motion must be denied.

B. Issues of Fact Exist in the Instant Matter

In any summary judgment proceeding, "[t]he non-moving party is required to introduce evidence beyond the mere pleadings to show that there is an issue of material fact concerning 'an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Nordco A.S. v. Ledes, 44 USPQ2d 1120, 1122 (SDNY 1997). Numerous issues of material fact exist in the instant matter, and Wynn possesses copious evidence demonstrating that the marks in question are not likely to cause confusion, Applicant's and Opposer's marks are clearly distinguished from each other, and Wynn has used the CABANA BAR & CASINO mark since at least April 28, 2005 for casino and bar services, while Venture Out has never used its alleged CABANA mark for casino and bar services. There are, therefore, issues of material fact concerning "elements essential to [Venture Out's] case," specifically whether Wynn's use of the CABANA BAR & CASINO mark is likely to cause confusion among the consuming public when considered against Venture Out's mark.

"Because of the factual nature of trademark disputes, summary judgment is generally disfavored in the trademark arena." KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 408 F.3d 596, 602 (9th Cir.2005). Moreover, "[s]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 242-43 (1986). In this case, the dispute about material facts, specifically perceived consumer confusion and priority of use, is genuine. A reasonable jury could easily find that the issues of fact presented fall in favor of Wynn. As such, summary judgment is inappropriate and Opposer's Motion should be denied.

1. Opposer Does Not Have Priority of Use in Any Mark Containing the Term "CABANA" for Casino and Bar Services

Wynn has been using the CABANA BAR & CASINO Marks in commerce since April 28, 2005, the opening date of the WYNN LAS VEGAS resort hotel casino. See Tourek Dec. at ¶ 5. The Cabana Bar & Casino at Wynn Las Vegas does not offer hotel services. Rather, the Cabana Bar & Casino is one of several "on-site" establishments offering gambling, food and beverage services to guests already registered at the Wynn Las Vegas resort. See id. at ¶ 9, 10. Opposer Venture Out has operated "The Cabana at Waikiki," a small hotel in Honolulu, Hawaii, since 1999. See The Cabana at Waikiki Website Print-out, **Exhibit 3**; Advertisements for the Cabana at Waikiki, Exhibits A and B to Opposer's Motion. The Cabana at Waikiki public advertising and promotion evidences that it has never operated a restaurant, bar or gaming establishment or offered such services under the CABANA mark. See Declaration of Lauri Thompson (the "Thompson Dec."), **Exhibit 4**.

In its Motion for Summary Judgment, Venture Out asserts without support that "it is indisputable that Opposer has priority of use," based on the 1999 opening of The Cabana at Waikiki. See Motion at 7. This assertion lacks merit, as Venture Out has never offered and could never offer casino services under the CABANA Mark. As

stated, casino gambling is illegal in Hawaii. In fact, since its opening in 1999, The Cabana at Waikiki has not operated a casino or gambling establishment of any kind on its property. See id. Therefore, only Wynn, not Venture Out, can conclusively establish priority of use in any mark containing the term "CABANA" for the casino services listed in Wynn's CABANA Mark applications.

Venture Out simply cannot establish priority for use of any mark containing the term "CABANA" for restaurant, bar and casino services. In fact, it admittedly has never used its CABANA mark to offer those services to the consuming public. Venture Out cannot demonstrate priority of use, and Wynn respectfully requests that the instant Motion for Summary Judgment be denied.

2. There Is No Likelihood of Confusion Between Applicant's and Opposer's Marks

Venture Out incorrectly argues that a likelihood of consumer confusion exists between its alleged CABANA mark and Wynn's CABANA BAR & CASINO mark based upon the Du Pont factors.[1] See Motion at 8. At the commencement of its argument, Venture Out boldly (but incorrectly) asserts "it is *indisputable* that Opposer's Mark and Applicant's Mark are confusingly similar." See id. (emphasis added). Something does not become "true" or "indisputable" because it has been aggressively asserted. Wynn disputes any likelihood of confusion between its CABANA BAR & CASINO mark and Venture Out's alleged "CABANA" mark and can provide clear evidence at trial supporting the dissimilarity of the marks.

Venture Out gives a cursory, incomplete, and inadequate analysis of the Du Pont

[1] The *Du Pont* factors are (1) the similarity or dissimilarity of the marks; (2) the similarity or dissimilarity of the goods or services; (3) the similarity or dissimilarity of the channels of trade; (4) the sophistication of the purchaser; (5) the fame of the prior mark; (6) the number and nature of similar marks on similar goods; (7) the nature and extent of any actual confusion; (8) the length of time of concurrent use without evidence of confusion; (9) the variety of goods on which the mark is used; (10) the market interface between applicant and owner of prior mark; (11) the extent to which the applicant has the right to exclude others from the marketplace; (12) the extent of potential confusion; (13) other facts probative of the effect of use. In re E.I. Du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

factors to support any likelihood of confusion, let alone the "indisputable" likelihood of confusion necessary for summary judgment. In fact, it only discusses three of the thirteen DuPont factors, and, despite its arguments to the contrary, each of these three factors actually weighs in favor of Applicant Wynn. Wynn can successfully demonstrate that each of the applicable factors weigh in favor of denial of the instant Motion.

a. *Similarity of the marks in question:*

Viewed in their entirety, Wynn's CABANA BAR & CASINO mark is much different than the "CABANA" mark allegedly used by Venture Out. Wynn's CABANA BAR & CASINO mark consists of the words CABANA BAR & CASINO in a stylized font. See Photographs of Actual Use of Wynn's CABANA BAR & CASINO Mark, **Exhibit 5**. On the other hand, Venture Out's alleged CABANA mark consists of the stylized phrase THE CABANA AT WAIKIKI, written in a circular shape around a Hawaiian design logo. See Cabana at Waikiki Website Print-out. Taken in their entireties, Applicant's mark and Opposer's alleged mark are difference in appearance, sound, connotation and commercial impression.

In its Motion, Venture Out claims the disclaimer of the words BAR and CASINO in Wynn's trademark application somehow removes these terms from the overall appearance of the mark, leaving only the "dominant" term CABANA. Venture Out's analysis is flawed. A disclaimer in a trademark application does not serve to "remove" the disclaimed portion from the mark from the analysis or the public's view. In fact, a disclaimer in an application to register a mark is a "technicality" with no legal effect on a likelihood of confusion analysis. In re National Data Corp., 753 F.2d 1056, 224 U.S.P.Q. 749 (Fed. Cir. 1985). In any likelihood of confusion analysis, the mark must be considered as a whole in evaluating its similarity to the other mark. In re Jane P. Semans, 193 USPQ 727 (TTAB 1976). A disclaimer has no effect upon consumers. Consumers are impressed by the mark as they see it or hear it and understand it, and are almost always unaware of what words have been disclaimed during prosecution of a

trademark application. In re National Data Corp., 753 F.2d 1056, 224 U.S.P.Q. 749 (Fed. Cir. 1985). Indeed, most consumers are likely unaware that any trademark terms need to be disclaimed in the trademark application process. As such, Wynn's CABANA BAR & CASINO mark must be analyzed in its entirety, including the disclaimed terms. Given this standard, it is clear that even a cursory comparison of the marks in question gives rise to dissimilarities in the overall sight, sound, connotation, and commercial impression of the marks.

b. *Nature of the goods and services:*

Wynn's application for CABANA BAR & CASINO lists "casino services" as the relevant services offered under the Mark. See Application for CABANA BAR & CASINO. Venture Out's application for CABANA lists "hotel services" as the relevant services offered under the Mark. See Application for CABANA, **Exhibit 6**. There is no inherent relation between the services offered under Wynn's and Venture Out's respective marks. Consumers do not necessarily associate casino services with hotel services. They are separate and distinct. In fact, that distinction is reflected in the USPTO class designation where casino services are registered in Class 41 as entertainment services, and hotel services are registered in Class 43. Further, Wynn has never offered "hotel services" under its CABANA BAR & CASINO mark, limiting its use to bar, lounge, restaurant, and gambling services. The services offered under each Applicant's and Opposer's marks are inherently different from one another and pose no likelihood of confusion through concurrent use.

Venture Out cites numerous "marquee" hotels owning trademark registrations for both hotel services and casino services, in an attempt to somehow link the two services together and prove consumer confusion regarding the source of each service. See Motion at 10. Again, Venture Out offers this Board a flawed factual analysis. The hotels and trademarks cited by Venture Out (including CAESARS PALACE, BELLAGIO, HARRAHS, HARD ROCK CASINO, and others) are the famous "house-marks" of the

hotels and resorts in Las Vegas actually owning the marks in question. Obviously, a large casino or resort, such as Wynn, will offer goods and services in several categories under its prominent "house-marks." The fact that many resorts offer both "hotel services" and "casino services" under their house-marks is irrelevant. The majority of hotels across the country do not market casino services under the same mark as hotel services. Opposer fails to show any significance in the fact that a few hotels in Las Vegas do.

Here, Wynn's application is not even for its WYNN house-mark, but for CABANA BAR & CASINO to market a small dining and gambling establishment located near the pool at the Wynn resort. Wynn's Cabana Bar & Casino offers no hotel rooms, lodging, room-service, housekeeping, wake-up calls, laundry service, valet service, concierge service or any other service a consumer would logically associate with "hotel services." Similarly, The Cabana at Waikiki offers no gambling, drinks, video slots, video poker, or any other service a consumer would logically associate with "casino services." See Thompson Dec. It is disingenuous for Venture Out to argue these services are in any way related, simply because a few famous Las Vegas hotels have registered their house-mark in both categories, namely hotel services in Class 43 and casino services in Class 41.

c. *Similarity of Trade Channels*

Any likelihood of confusion based upon the similarity of established trade channels requires "more than a theoretical possibility" that the goods or services in question would be marketed and sold to the same customers. See PC Club v. Primex Technologies, Inc. 32 Fed.Appx. 576, 579 (Fed. Cir. 2002). Venture Out asserts that the trade channels for the marks in question are identical because Wynn's CABANA BAR & CASINO applications lack trade restrictions and because hotel services are offered on the Wynn property -- even though they are not offered using any variation of the CABANA BAR & CASINO mark. This argument mischaracterizes both the legal

standard regarding trade channels and the relevant facts at issue.

The trade channels used by Wynn in its use of the CABANA BAR & CASINO marks are significantly different than the trade channels used by Venture Out in its alleged use of CABANA or THE CABANA AT WAIKIKI. Wynn's "trade" for purposes of this Opposition is providing casino services to guests already staying at its resort. No advertisement, marketing, or any other material is used to promote the CABANA BAR & CASINO outside of the Wynn resort itself. On the other hand, the "trade" being used by Venture Out is attracting guests to a small, uniquely themed specialty hotel in Hawaii, primarily advertised as the only "gay-owned and operated" resort in Waikiki. See Advertisements for the Cabana at Waikiki; Cabana at Waikiki Website Print-out. Venture Out markets its property on its website and through printed advertisements and brochures.

The fact that hotel services are offered at the Wynn Las Vegas resort is irrelevant in a trade channels analysis. Wynn's CABANA BAR & CASINO applications are not for hotel services, and no such services have ever been offered under the Wynn's CABANA BAR & CASINO marks or any variations of those marks. Further, Wynn's CABANA BAR & CASINO marks are not marketed to any customers outside the Wynn Las Vegas resort, and the marks are not featured in printed advertisements, commercials, or other marketing materials available to the general public. As such, Wynn's CABANA BAR & CASINO marks have never been used or marketed in the same trade channels as Venture Out's CABANA or THE CABANA AT WAIKIKI marks, and this factor weighs heavily in favor of Wynn.

d. *The sophistication of the purchaser:*

The fourth factor generally considered in a likelihood of confusion analysis is the level of sophistication of the purchaser of the goods and/or services. DuPont, 177 USPQ at 567. Essentially, the court in DuPont defined this factor as considering "[t]he

conditions under which and buyers to whom sales are made, i.e. 'impulse' vs. careful, sophisticated purchasing." Id. Furthermore, this Board has held that while the knowledgeability and sophistication level of relevant purchasers are not absolutely determinative of whether they are likely to be confused, likelihood of consumer confusion is minimized by circumstances that suggest consumers are exercising care in purchasing. See In re Decombe, 9 USPQ2d 1812 (TTAB 1988); In re Pellerin Milnor Corp., 221 USPQ 558 (TTAB 1983).

In the instant case, this factor weighs in favor of the Applicant. It is difficult to imagine a consumer, when confronted with Applicant's mark poolside on the resort property, being confused as to the source of the casino services provided. Consumers will not think they were transported to Hawaii to gamble there. Specifically, Wynn's guests are unlikely to believe that Wynn's CABANA BAR & CASINO is related to Opposer's small specialty hotel in Hawaii. At the very least, such consumers will be aware that they are inside Applicant's resort, the world famous Wynn Las Vegas, and recognize Applicant's use of the mark to identify the specific services available only to guests of the resort. Therefore, it is highly unlikely that any consumer would believe that Applicant's use of this mark for strictly on-property casino services is related in any way to Opposer's hotel mark, which is marketed to a niche, specialty group.

Moreover, the concurrent use of the marks at issue is unlikely to confuse consumers at the reservation stage. Vacation time is very important to most people, and hotel reservations are not likely to be made as a result of an "impulse," particularly a hotel resort such as the Wynn, which is well known for offering world-class, exclusive accommodations. As such, when consumers are planning a vacation and booking a hotel, they are likely to exercise a great deal of care in determining exactly where they

will stay and what types of accommodations they are seeking. Hotel reservations require a great deal of thought from the consumer and are typically not purchased as an impulse.

Furthermore, when consumers are planning their vacations and researching the potential hotel accommodations available at their chosen destination, they will not encounter Applicant's mark as indicating hotel services. In fact, they will likely not even be aware of Applicant's use of the CABANA BAR & CASINO mark. Rather, consumers will only see this mark inside the hotel casino as one of the many amenities located inside.

e. *The fame of the prior mark:*

Another factor considered in a likelihood of confusion analysis is the fame of the prior mark. DuPont, 177 USPQ at 567. The Federal Circuit has held that famous marks with extensive public recognition and renown should receive more legal protection than weaker marks. Kenner Parker Toys Inc. v. Rose Art Industries, Inc., 22 USPQ2d 1453, 1456 (Fed. Cir. 1992), cert. denied, 506 U.S. 862 (1992). However, establishing that a particular mark is famous is a factually intensive inquiry that must be substantiated by adequate and relevant evidence. See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005); Bose Corp. v. QSC Audio Products Inc., 63 USPQ2d 1305 (Fed. Cir. 2002); Giant Food, Inc. v. Nation's Foodservice, Inc., 218 USPQ 390 (Fed. Cir. 1983); Tiffany & Broadway v. Commissioner, 167 F. Supp.2d 949 (S.D. Tex. 2001).

Here, an analysis of this factor favors Applicant. Opposer has offered no evidence to indicate that its mark has achieved even a remote level of famousness. In fact, Opposer does not even argue or suggest that its mark is famous. Therefore, Opposer's mark is not afforded the heightened degree of protection given to famous

marks. As such, famousness of the prior mark is not a consideration, reinforcing the conclusion that consumer confusion is unlikely.

f. *The number and nature of similar marks in use on similar goods:*

Third party uses and registrations of similar marks are generally not given much weight in a likelihood of confusion analysis; however, they may be relevant to show common use of a mark or term, indicating the consuming public's general ability to distinguish between the various sources of the goods and/or services offered under the similar marks. See AMF Inc. v. American Leisure Products, Inc., 177 USPQ 268, 269-70 (CCPA 1973); Plus Products v. Star-Kist Foods, Inc., 220 USPQ 541, 544 (TTAB 1983).

In the present case, a cursory search of the USPTO's official website shows over 100 live registrations and applications for marks incorporating the term CABANA for a variety of goods and services. See United States Patent and Trademark Office official website available at <uspto.gov/index.html>. Therefore, due to the common nature of the term "CABANA" and the fact that the average consumer has been exposed to this mark as a source indicator for a variety of unrelated uses, it is unlikely that consumer confusion will result between Applicant's and Opposer's marks.

g. *The nature and extent of actual confusion and the length of concurrent use without evidence of actual confusion:*

When determining whether there exists a likelihood of confusion, weight is given to the number and extent of instances of actual confusion. Al-Site Corp. v. VSI Int'l, Inc., 174 F.3d 1308, 50 U.S.P.Q.2d 1161 (Fed. Cir. 1999). This is because "evidence of actual confusion is undoubtedly the best evidence of likelihood of confusion." Thompson v. Haynes, 305 F.3d 1369, 64 U.S.P.Q.2d 1650 (Fed. Cir. 2002).

Accordingly, the absence of actual confusion has been considered an important factor. David Sherman Corp. v. Heublein, Inc., 340 F.2d 377, 380; 144 USPQ 249 (8th Cir. 1965). Finally, the absence of actual confusion despite several years of simultaneous use weighs against a finding of any likelihood of confusion. Al-Site Corp. v. VSI Int'l, Inc., 174 F.3d 1308, 50 U.S.P.Q.2d 1161 (Fed. Cir. 1999). The importance of this factor increases where marks are used in the same or similar markets. Id.

Venture Out has not provided a single piece of evidence demonstrating actual confusion amongst the relevant consuming public. After nearly two years of alleged concurrent use of the marks at issue, Venture Out has not alleged any instances of actual confusion. It can thus be inferred that Venture Out is unaware of any such instances. Furthermore, the fact that Wynn and Venture Out have been using marks containing the term "CABANA" concurrently for more than two years without any actual confusion renders any likelihood of confusion occurring in the future speculative at best. These two factors weigh heavily in favor of Wynn.

h. *The variety of goods on which the mark is used:*

Where the owner of a mark has licensed its mark for use on a large number of diverse products, consumer confusion is more likely. Time Warner Entm't Co. L.P. v. Jones, 65 U.S.P.Q.2d 1650 (TTAB 2002). Conversely, where the owner of a mark limits use of the mark to a discrete class of goods and services, consumer confusion is less likely. Id.

As mentioned previously, Wynn's application for CABANA BAR & CASINO is for "casino services." See Wynn Application. Wynn limits use of the CABANA mark exclusively to these services and restaurant, bar and cocktail lounge services. It has not licensed its mark for use in connection with any other services, including hotel services, nor has it expanded its own use of the CABANA mark to other goods and

services. In short, Wynn's use of the mark CABANA is limited to those services indicated in its application and nothing more.

Further, there is no evidence indicating that Opposer Venture Out uses the CABANA mark for anything other than hotel services. It does not allege that it uses the mark for any other purpose, nor does it allege that it has licensed the mark. Again, an examination of this factor favors Wynn and strongly argues against summary judgment.

i. *Market interface between applicant and owner of prior mark:*

Pursuant to DuPont, the market interface between applicant and the owner of a prior mark may be relevant to a likelihood of confusion analysis. This interface may be demonstrated by any of the following: (a) a "consent" to register or use the mark between the applicant and prior owner; (b) agreement provisions between the applicant and prior owner designed to preclude confusion of the mark, (c) assignment of mark, application, registration and good will of the related business by the prior owner to the applicant, or (d) laches and estoppel attributable to the owner of the prior mark that indicates a of lack of confusion in the marketplace. In re E.I. Du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

In this case, Wynn is proprietary owner of the CABANA mark. Wynn did not gain rights to use this mark through a consent agreement, purchase agreement, or other assignment of the mark from a prior owner. Therefore, this factor does not weigh in favor of either party.

j. *The extent to which the applicant has the right to exclude others from the marketplace:*

Exclusive right to trademark belongs to one who first uses it in connection with trade in certain goods or services. 15 U.S.C. § 1052. However, an applicant cannot claim exclusive rights in descriptive words. 15 U.S.C. § 1052(e)(1). To do so would allow the applicant to remove common words from the public domain and deny "fair

use" of those marks in commerce. In re State Chemical Mfg. Co., 225 U.S.P.Q. 687 (TTAB 1985).

Here, Wynn does not claim rights to a descriptive word that would deny the Venture Out "fair use" of that word. Rather, Wynn claims exclusive rights in the mark CABANA, which is suggestive or fanciful in relation to the casino services provided under the mark. Wynn has a right to exclude Venture Out from using the CABANA Mark for casino services, but has claimed no right to exclude Venture Out from using CABANA for hotel services. As discussed, the services offered under the two marks are quite distinct. Therefore, this factor weighs in favor of Wynn.

k. *The extent of potential confusion:*

When analyzing the extent of potential confusion between two marks, courts often refer back to the analysis of the similarity or dissimilarity of the goods or services in question (Du Pont factor 2), and the similarity or dissimilarity of the trade channels used by each mark (Du Pont factor 3). See, e.g., Cunningham v. Laser Golf Corp, 222 F.3d 943, 949 (C.A. Fed. 2000). As demonstrated, the services offered by Wynn and Venture Out under their respective marks are quite different and distinct, as are the channels of trade used to market and promote the marks. As such, any potential confusion between the Marks at issue is *de minimis*.

Wynn owns and operates the world-famous Wynn Las Vegas resort, offering a myriad of dining, bar, lounge, nightclub, casino, and retail services to the public. The CABANA BAR & CASINO is one of many such services at the Wynn Las Vegas. Venture Out, on the other hand, owns and operates The Cabana at Waikiki, a small, specialty hotel in Hawaii that offers no dining, bar, lounge nightclub, or casino services to its guests or the public. There is simply no plausible argument available to Venture Out that could lead to a finding of potential confusion between the two marks at issue. Customers of a small, niche hotel in Hawaii are not going to be confused as to the source of the services offered under Wynn's CABANA BAR & CASINO. The respective

marks are marketed to different consumers, in different markets, through different means, and for different goods and services. This factor weighs heavily in favor of Wynn, as no potential confusion between the Marks exists.

l. *Other facts probative of the effect of use*:

The last Du Pont factor serves as a "catchall," allowing other relevant facts pertaining to the likelihood of confusion between the two marks to be introduced and analyzed. Venture Out has argued in support of only three of the above factors, and has not offered any additional facts or evidence that support a finding of likelihood of confusion between the CABANA Marks at issue. While Wynn could proffer more evidence and probative facts distinguishing the two Marks and diminishing any likelihood of confusion, this analysis would be unnecessary, as Wynn has clearly demonstrated the majority of the Du Pont factors weigh heavily in its favor.

IV. CONCLUSION

Genuine issues of material fact exist as to the priority of use and likelihood of confusion arising from the parties' uses of the marks in question. Further, each of the Du Pont factors in determining the likelihood of confusion weigh heavily in favor of Wynn. The evidence presented is such that a jury could reasonably find for Wynn. Therefore, Venture Out's Motion for Summary Judgment should be denied.

DATED: August 16, 2006.

GREENBERG TRAURIG, LLP

Mark G. Tratos
F. Christopher Austin
Laraine M. I. Burrell
Tyler R. Andrews
3773 Howard Hughes Parkway,
Suite 500 North
Las Vegas, Nevada 89109
Counsel for Applicant

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2006 I served the foregoing APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT on:

Martin E. Hsia
CADES SCHUTTE LLP
1000 Bishop Street, Suite 1200
Honolulu, HI 96813

Counsel for: Opposer

by causing a full, true, and correct copy thereof to be sent by the following indicated method or methods, on the date set forth below:

☐ by faxing to the attorney at the fax number that is the last-known fax number.

☒ by electronic mail to the last known e-mail address.

☐ by sending via overnight courier in a sealed envelope.

☐ by hand delivery.

☒ by mailing in a sealed, first-class postage-prepaid envelope, addressed to the last-known office address of the attorney, and deposited with the United States Postal Service at Las Vegas, Nevada.

An employee of Greenberg Traurig, LLP

EXHIBIT 1

UNITED STATES PATENT AND TRADEMARK OFFICE

TRADEMARK TRIAL AND APPEAL BOARD

VENTURE OUT PROPERTIES LLC, Opposer, v. WYNN RESORTS HOLDINGS, LLC, Applicant.	Opposition No. 91167237

DECLARATION OF KEVIN TOUREK IN SUPPORT OF APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT

I, Kevin Tourek, declare under penalty of perjury under the laws of the United States that the facts contained herein are of my personal knowledge, and if called upon, I could and would competently testify to them.

1. This declaration is submitted in support of Plaintiff's Opposition to Opposer's Motion for Summary Judgment.

2. I am Senior Vice President and General Counsel of Wynn Las Vegas, LLC, a wholly owned subsidiary of Wynn Resorts, Limited, the sole member of Plaintiff Wynn Resorts Holdings, LLC ("Wynn Resorts"). I have been employed by Wynn Las Vegas, LLC and its predecessor entity since February 3, 2003.

3. Wynn Resorts, Limited, a Nevada limited liability company with its principal place of business in Las Vegas, Nevada, is the sole member of Wynn Las Vegas, LLC, which owns and operates the Wynn Las Vegas resort hotel casino. Wynn Las Vegas resort hotel casino opened for business on April 28, 2005.

4. On or about August 27, 2004, Applicant caused to be filed with the U.S. Patent and Trademark Office an intent-to-use application denoted as Serial no.

78/475098 to register "CABANA BAR & CASINO" in a design for casino services in International Class 41.

5. The Cabana Bar & Casino opened and began providing casino services on April 28, 2005, the day the Wynn Las Vegas resort hotel casino opened for business.

6. The Cabana Bar & Casino mark is used only in conjunction with the Wynn Las Vegas resort hotel casino.

7. The Cabana Bar & Casino mark is not used to provide hotel services or to draw patrons to the Wynn Las Vegas resort hotel casino.

8. The Cabana Bar & Casino is a semi-permanent, open walled, cabana structure with a canopy roof, adjoining a swimming pool at the Wynn Las Vegas resort hotel casino.

9. The Cabana Bar & Casino and the swimming pool are located on the Wynn Las Vegas resort hotel casino property behind the hotel casino and can only be reached by passing through the hotel casino.

10. In passing through the Wynn Las Vegas resort hotel casino to reach the Cabana Bar & Casino and the swimming pool, a number of signs and advertisements put the visitor on notice that the property and its amenities (including the Cabana Bar & Casino) are part of the Wynn Las Vegas resort hotel casino.

11. The swimming pool and the Cabana Bar & Casino are open only to adult guests who are patrons of Wynn Las Vegas resort hotel casino.

12. The Cabana Bar & Casino offers alcohol and other beverages, pre-prepared food and snacks for sale to pool guests, as well as opportunities to gamble.

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13. Attached to the Opposition to Motion for Summary Judgment as Exhibit 5 filed herewith are two true and correct photographs of the Cabana Bar & Casino at the Wynn Las Vegas resort hotel casino.

Executed this 16TH day of August 2006 at Las Vegas, Nevada.

Kevin Tourek

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DECLARATION OF KEVIN TOUREK IN SUPPORT OF APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT on:

Martin E. Hsia
CADES SCHUTTE LLP
1000 Bishop Street, Suite 1200
Honolulu, HI 96813

Counsel for: Opposer

by causing a full, true, and correct copy thereof to be sent by the following indicated method or methods, on the date set forth below:

- ☒ by mailing in a sealed, first-class postage-prepaid envelope, addressed to the last-known office address of the attorney, and deposited with the United States Postal Service at Las Vegas, Nevada.
- ☐ by hand delivery.
- ☐ by sending via overnight courier in a sealed envelope.
- ☐ by faxing to the attorney at the fax number that is the last-known fax number.
- ☒ by electronic mail to the last known e-mail address.

DATED: August 16, 2006.

An employee of Greenberg Traurig

EXHIBIT 2

Trademark/Service Mark Application, Principal Register

Serial Number: 78475098
Filing Date: 08/27/2004

The table below presents the data as entered.

MARK SECTION	
MARK FILE NAME	\\ticrs\EXPORT11\IMAGEOUT 11\784\750\78475098\xml1\ APP0002.JPG
STANDARD CHARACTERS	NO
USPTO-GENERATED IMAGE	NO
LITERAL ELEMENT	CABANA BAR & CASINO
COLOR MARK	NO
DESCRIPTION OF THE MARK (and Color Location, if applicable)	The mark consists of the stylized word CABANA on top of the stylized words BAR & CASINO.
PIXEL COUNT ACCEPTABLE	YES
PIXEL COUNT	940 x 250
OWNER SECTION	
NAME	Wynn Resorts Holdings, LLC
STREET	3131 Las Vegas Blvd. South
CITY	Las Vegas
STATE	NV
ZIP/POSTAL CODE	89109
COUNTRY	United States
AUTHORIZED EMAIL COMMUNICATION	No
LEGAL ENTITY SECTION	
TYPE	LIMITED LIABILITY COMPANY
STATE/COUNTRY UNDER WHICH ORGANIZED	Nevada
NAME OF ALL GENERAL PARTNERS, ACTIVE MEMBERS, INDIVIDUAL, TRUSTEES, OR EXECUTORS, AND CITIZENSHIP/ INCORPORATION	Valvino Lamore, LLC a Nevada limited liability company, sole member; Wynn Resorts, Limited a Nevada corporation, sole member of Valvino Lamore, LLC
GOODS AND/OR SERVICES SECTION	
INTERNATIONAL CLASS	041
DESCRIPTION	casino services
FILING BASIS	Section 1(b)
SIGNATURE SECTION	

SIGNATURE	/Marc H. Rubinstein/
SIGNATORY NAME	Marc H. Rubinstein
SIGNATORY DATE	08/27/2004
SIGNATORY POSITION	Senior Vice President, General Counsel and Secretary of Wynn Resorts, Limited a Nevada corporation
PAYMENT SECTION	
NUMBER OF CLASSES	1
NUMBER OF CLASSES PAID	1
SUBTOTAL AMOUNT	335
TOTAL AMOUNT	335
ATTORNEY	
NAME	Lauri S. Thompson, Esq.
FIRM NAME	QUIRK & TRATOS
INTERNAL ADDRESS	Suite 500N
STREET	3773 Howard Hughes Parkway
CITY	Las Vegas
STATE	NV
ZIP/POSTAL CODE	89109
COUNTRY	United States
PHONE	702-792-3773
FAX	702-792-9002
EMAIL	PTO@quirkandtratos.com
AUTHORIZED EMAIL COMMUNICATION	Yes
ATTORNEY DOCKET NUMBER	0410 cabana bar & casino cl 41
OTHER APPOINTED ATTORNEY(S)	Mark G. Tratos, Edward J. Quirk, Rob L. Phillips, James R. Boyd, Jason D. Firth, F. Christopher Austin, Lauri S. Thompson, Ronald D. Green, Jr., Carrie E. Peterman, Donald L. Prunty, Laraine M.I. Burrell, and R. Richard Costello
CORRESPONDENCE SECTION	
NAME	Lauri S. Thompson, Esq.
FIRM NAME	QUIRK & TRATOS
INTERNAL ADDRESS	Suite 500N
STREET	3773 Howard Hughes Parkway
CITY	Las Vegas
STATE	NV
ZIP/POSTAL CODE	89109
COUNTRY	United States
PHONE	702-792-3773

FAX	702-792-9002
EMAIL	PTO@quirkandtratos.com
AUTHORIZED EMAIL COMMUNICATION	Yes
FILING INFORMATION	
SUBMIT DATE	Fri Aug 27 17:22:53 EDT 2004
TEAS STAMP	USPTO/BAS-6311023718-2004 0827172253703533-78475098 -200764ee288693a5252f8316 e3e0c0b98c-DA-297-2004082 7172212653350

Trademark/Service Mark Application, Principal Register

Serial Number: 78475098
Filing Date: 08/27/2004

To the Commissioner for Trademarks:

MARK: CABANA BAR & CASINO (stylized and/or with design, see mark)
The literal element of the mark consists of CABANA BAR & CASINO.
The mark consists of the stylized word CABANA on top of the stylized words BAR & CASINO.
The applicant, Wynn Resorts Holdings, LLC, a limited liability company organized under the laws of Nevada, comprising of Valvino Lamore, LLC a Nevada limited liability company, sole member; Wynn Resorts, Limited a Nevada corporation, sole member of Valvino Lamore, LLC , residing at 3131 Las Vegas Blvd. South, Las Vegas, NV, United States, 89109, requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended.
Intent to Use: The applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services. (15 U.S.C. Section 1051(b)).
International Class 041: casino services
The applicant hereby appoints Lauri S. Thompson, Esq. and Mark G. Tratos, Edward J. Quirk, Rob L. Phillips, James R. Boyd, Jason D. Firth, F. Christopher Austin, Lauri S. Thompson, Ronald D. Green, Jr., Carrie E. Peterman, Donald L. Prunty, Laraine M.I. Burrell, and R. Richard Costello of QUIRK & TRATOS, Suite 500N, 3773 Howard Hughes Parkway, Las Vegas, NV, United States, 89109 to submit this application on behalf of the applicant. The attorney docket/reference number is 0410 cabana bar & casino cl 41.
The USPTO is authorized to communicate with the applicant or its representative at the following email address: PTO@quirkandtratos.com.
A fee payment in the amount of $335 will be submitted with the application, representing payment for 1 class(es).

Declaration

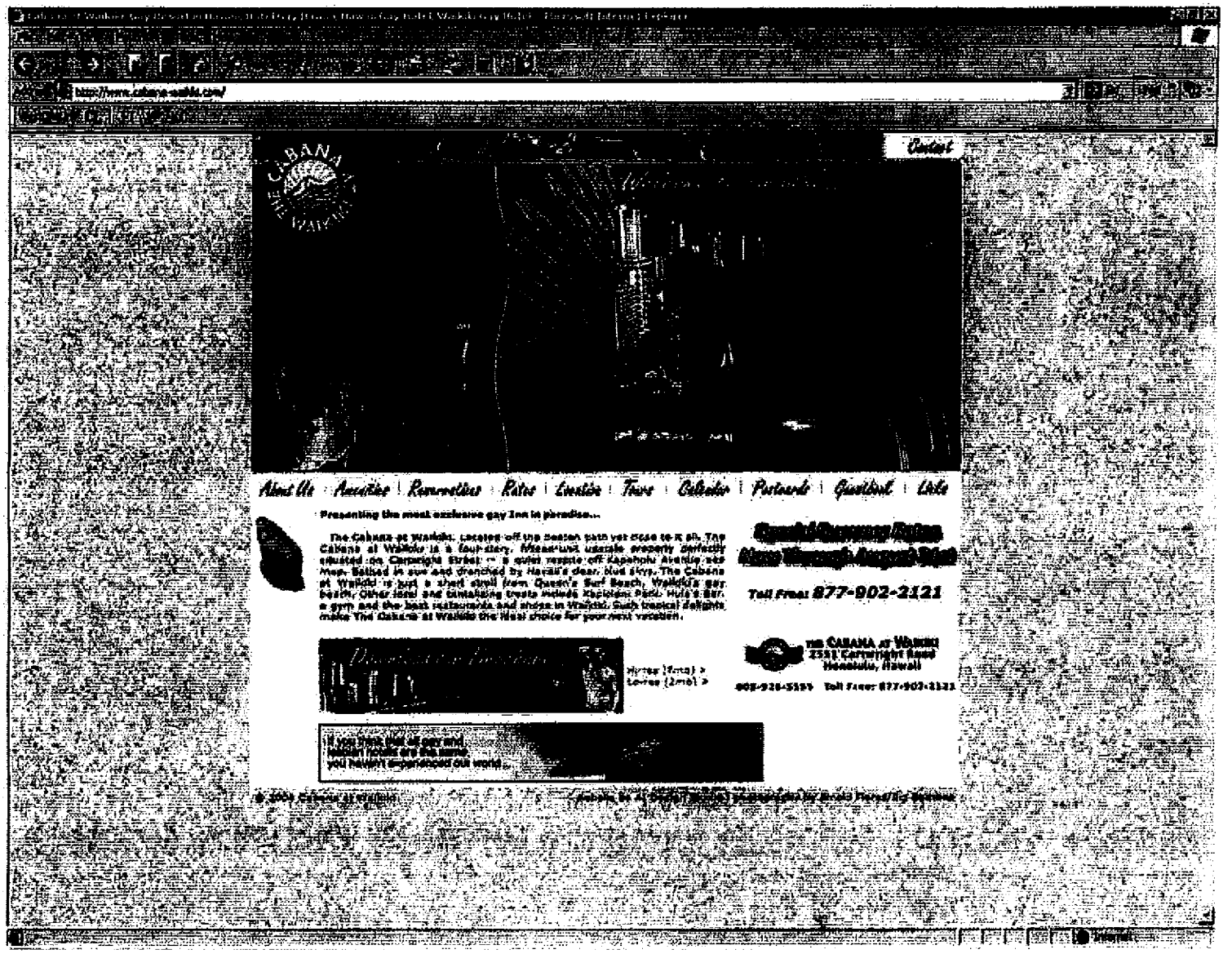
The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.
Signature: /Marc H. Rubinstein/ Date: 08/27/2004
Signatory's Name: Marc H. Rubinstein
Signatory's Position: Senior Vice President, General Counsel and Secretary of Wynn Resorts, Limited a Nevada corporation
Mailing Address:

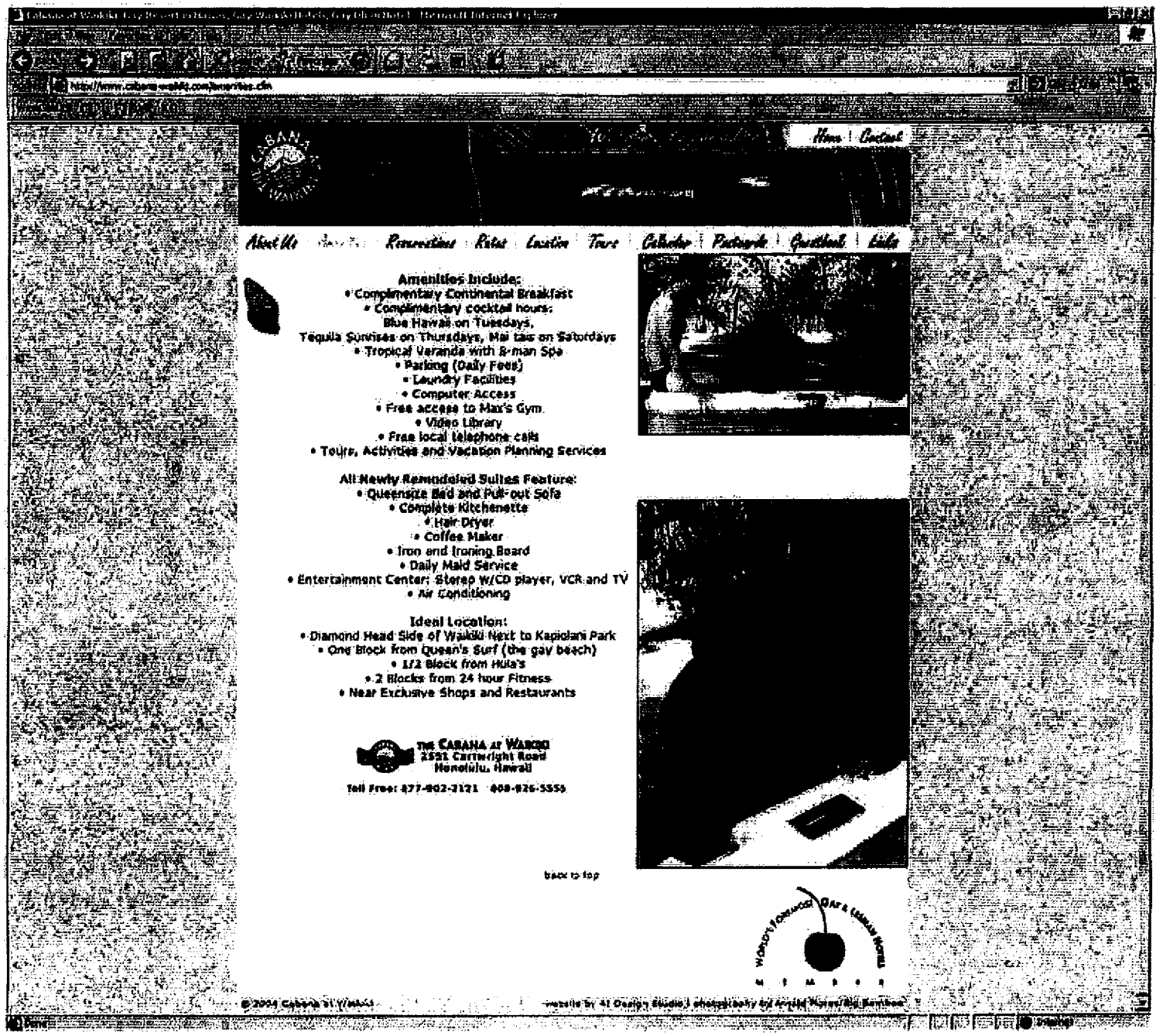
Lauri S. Thompson, Esq.
Suite 500N
3773 Howard Hughes Parkway
Las Vegas, NV 89109
RAM Sale Number: 297
RAM Accounting Date: 08/30/2004
Serial Number: 78475098
Internet Transmission Date: Fri Aug 27 17:22:53 EDT 2004
TEAS Stamp: USPTO/BAS-6311023718-2004082717225370353
3-78475098-200764ee288693a5252f8316e3e0c
0b98c-DA-297-20040827172212653350

CABANA

BAR & CASINO

EXHIBIT 3


Contact
About Us | Amenities | Renovations | Rates | Location | Tours | Calendar | Postcards | Guestbook | Links
Presenting the most exclusive gay Inn in paradise...
Toll Free: 877-902-2121
THE CABANA at WAIKIKI
2551 Cartwright Road
Honolulu, Hawaii


Home | Contact
About Us
Reservations
Rates
Location
Tours
Calendar
Postcards
Guestbook
Links
Amenities Include:
• Complimentary Continental Breakfast
• Complimentary cocktail hours:
Blue Hawaii on Tuesdays,
Tequila Sunrises on Thursdays, Mai tais on Saturdays
• Tropical Veranda with 8-man Spa
• Parking (Daily Fees)
• Laundry Facilities
• Computer Access
• Free access to Max's Gym
• Video Library
• Free local telephone calls
• Tours, Activities and Vacation Planning Services
All Newly Remodeled Suites Feature:
• Queensize Bed and Pull-out Sofa
• Complete Kitchenette
• Hair Dryer
• Coffee Maker
• Iron and Ironing Board
• Daily Maid Service
• Entertainment Center: Stereo W/CD player, VCR and TV
• Air Conditioning
Ideal Location:
• Diamond Head Side of Waikiki Next to Kapiolani Park
• One Block from Queen's Surf (the gay beach)
• 1/2 Block from Hula's
• 2 Blocks from 24 hour Fitness
• Near Exclusive Shops and Restaurants
THE CABANA at WAIKIKI
2551 Cartwright Road
Honolulu, Hawaii
Toll Free: 877-802-3121 808-926-5555
back to top
MEMBER

Cabana at Waikiki Gay Resort at Hawaii, Gay Waikiki Hotel, Gay Friendly Oahu Hotel - Microsoft Internet Explorer

File Edit View Favorites Tools Help

Back Search Favorites

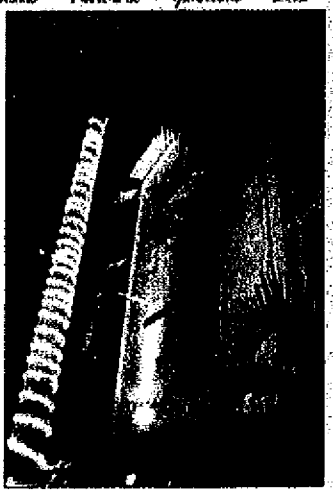
Address http://www.cabana-waikiki.com/cabanas.cfm

Home Contact

Amenities Reservations Rates Location Tours Calendar Postcards Guestbook Links

About Us

The Cabana is a four story, fifteen-suite property situated one block from world renowned Waikiki Beach. The Cabana is gay-owned and operated. Our goal is to provide personal attention in a relaxed, intimate atmosphere. The Cabana is a place where both men and women can relax, make friends and enjoy all the amenities our newly remodeled one-bedroom suites have to offer.



Cabana at Waikiki Awards:

The Cabana at Waikiki has received some prestigious awards and recognitions.

Out & About
The nation's leading gay and lesbian travel newsletter named the Cabana to their Top Ten North American Gay Guesthouses.

Da Kine Magazine
The readers of Hawaii's top gay and lesbian publication picked the Cabana as Honolulu's Best Hotel.

We've even received the recognition of the governor of Hawaii. To read the letter, click here.

THE CABANA AT WAIKIKI
2551 Cartwright Road
Honolulu, Hawaii
Toll Free: 877-902-2321 808-926-5555

WORLD'S FOREMOST GAY & LESBIAN HOTELS
M E M B E R

Website by Al Design Studio | photography by Angel Flores Big Bamboo

Done Internet

EXHIBIT 4

UNITED STATES PATENT AND TRADEMARK OFFICE

TRADEMARK TRIAL AND APPEAL BOARD

VENTURE OUT PROPERTIES LLC, Opposer, v. WYNN RESORTS HOLDINGS, LLC, Applicant.	Opposition No. 91167237

DECLARATION OF LAURI THOMPSON IN SUPPORT OF APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT

I, Lauri Thompson, declare under penalty of perjury under the laws of the United States that the facts contained herein are of my personal knowledge, and if called upon, I could and would competently testify to them.

1. This declaration is submitted in support of Plaintiff's Opposition to Opposer's Motion for Summary Judgment.

2. I am an attorney, licensed to practice law in all courts in the State of Nevada.

3. I am a shareholder with Greenberg Traurig, counsel for Plaintiff Wynn Resorts Holdings, LLC, in the above referenced matter.

4. On July 24, 2006, I placed a telephone call to Venture Out's "The Cabana at Waikiki" hotel in Honolulu, Hawaii.

5. During this phone conversation, I was informed by an employee of "The Cabana at Waikiki" that no food, beverage, bar, or restaurant services were offered on the premises of "The Cabana at Waikiki."

6. Attached to Applicant's Opposition to the Motion for Summary Judgment as Exhibit 3 filed herewith is a copy of portions of the website for Venture Out's "The

Cabana at Waikiki." Nowhere on this website is a reference to any bar, restaurant, or cocktail lounge services offered on the premises of "The Cabana at Waikiki."

Executed this 16th day of August 2006 at Las Vegas, Nevada.

Lauri Thompson

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DECLARATION OF LAURI THOMPSON IN SUPPORT OF APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT on:

Martin E. Hsia
CADES SCHUTTE LLP
1000 Bishop Street, Suite 1200
Honolulu, HI 96813

Counsel for: Opposer

by causing a full, true, and correct copy thereof to be sent by the following indicated method or methods, on the date set forth below:

☒ by mailing in a sealed, first-class postage-prepaid envelope, addressed to the last-known office address of the attorney, and deposited with the United States Postal Service at Las Vegas, Nevada.

☐ by hand delivery.

☐ by sending via overnight courier in a sealed envelope.

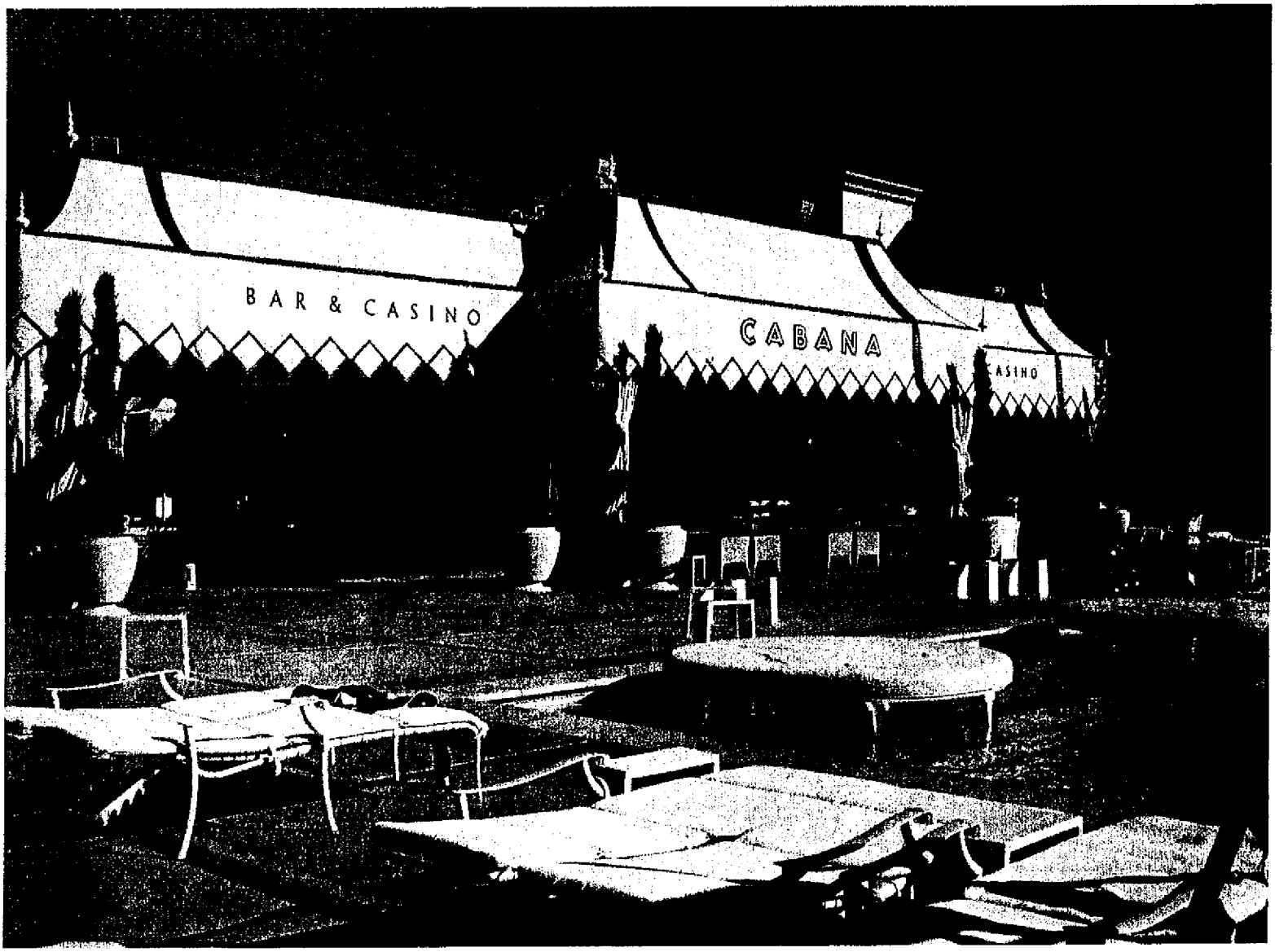
☐ by faxing to the attorney at the fax number that is the last-known fax number.

☐ by electronic mail to the last known e-mail address.

DATED: August 16, 2006.

Lan S. Whitehead
An employee of Greenberg Traurig

EXHIBIT 5


BAR & CASINO
CABANA

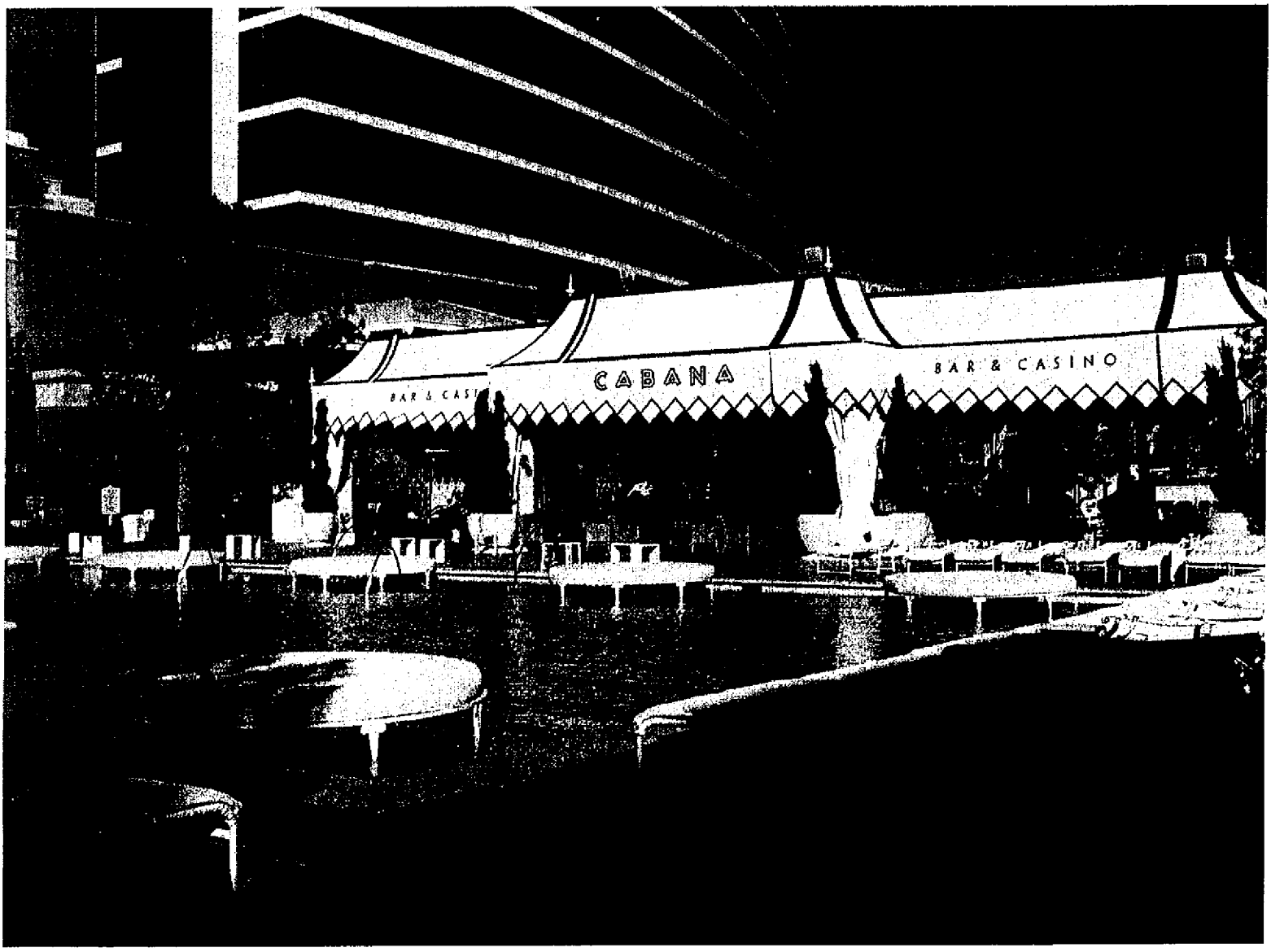

CABANA
BAR & CASINO

EXHIBIT 6

EXPRESS MAIL NO. EL537573629US

APPLICANT'S NAME: VENTURE OUT PROPERTIES LLC
A California limited liability company

ADDRESS: 177 Post Street, Suite 910
San Francisco, California 94108

LISTING OF GOODS AND/OR SERVICES:

Hotel services in International Class 43

BASIS FOR FILING:

Use in Commerce: Section 1(a)
Date of First Use Anywhere: At least as early as May, 1999.
Date of First Use in Commerce: At least as early as May, 1999.

CABANA

76630391

TRADEMARK APPLICATION SERIAL NO.

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE
FEE RECORD SHEET

02/11/2005 SWILSON1 00000017 76630391

01 FC:6001 375.00 OP

PTO-1555
(5/87)

cades schutte

EXPRESS MAIL NO. EL537573629US

February 4, 2005

Martin E. Hsia
Direct Line: (808) 544-3835
Direct Fax: (808) 540-5049
E-mail: mhsia@cades.com

Commissioner for Trademarks
P. O. Box 1451
Alexandria, VA 22313-1451

Re: Service Mark Application of VENTURE OUT PROPERTIES LLC, for "CABANA"

Dear Sir:

Enclosed are the following:

1. Application of VENTURE OUT PROPERTIES LLC, to register the service mark "CABANA" on the Principal Register for hotel services in International Class 43;

2. One sheet of a drawing showing the mark to be registered; and

3. One (1) specimen showing the mark as used.

Also enclosed is a check in the amount of $375.00, in payment of the filing fees.

Respectfully submitted,

for Judi Pauly

Martin E. Hsia - 32,471
Attorney for Applicant

Enclosures

Cades Schutte Building
1000 Bishop Street, Suite 1200
Honolulu, Hawaii 96813
Tel: 808.521-9200
Fax: 808.521-9210
www.cades.com

Kona Office
75-170 Hualalai Road, Suite 303
Kailua Kona, Hawaii 96740
Tel: 808.329-5811
Fax: 808.326-1175

EXPRESS MAIL NO. EL537573629US

TRADEMARK/SERVICE MARK APPLICATION (15 U.S.C. §§ 1051, 1126(d)&(e))

TO THE ASSISTANT COMMISSIONER FOR TRADEMARKS

APPLICANT INFORMATION

VENTURE OUT PROPERTIES LLC
177 Post Street, Suite 910
San Francisco, California 94108

APPLICANT ENTITY INFORMATION

A California limited liability company

TRADEMARK/SERVICE MARK INFORMATION

Mark: **CABANA**
The mark is presented in standard character format
without claim to any particular font style, size or color.
International Class: 43

BASIS FOR FILING AND GOODS/SERVICES INFORMATION

Use in Commerce: Section 1(a): Applicant is using, or is using through a related company, the mark in commerce on or in connection with the below-identified goods/services (15 U.S.C. § 1051(a)).

International Class 43

Hotel services

Date of first use of the mark anywhere: At least as early as May, 1999.

Date of first use of the mark in commerce: At least as early as May, 1999.

One (1) specimen showing the mark as used in commerce is submitted with this application.

FEE INFORMATION

$375.00 x 1 *(Number of Classes)* = $375.00 *(Total Filing Fee Paid)*

SIGNATURE INFORMATION

Applicant requests registration of the above-identified mark in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. § 1051 et seq., as amended) for the above-identified goods and/or services.

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. § 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

Signed at San Francisco, CA, this 1st day of February, 2005

VENTURE OUT PROPERTIES LLC

By _____
G. LEE FITZGERALD
Its Manager

CONTACT INFORMATION

Martin E. Hsia, 32,471
Cades Schutte
A Limited Liability Law Partnership
P. O. Box 939
Honolulu, Hawaii 96808
Tel: (808) 544-3835
Fax: (808) 540-5049
E-mail: mhsia@cades.com